

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 20, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2305

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ACTION LAW, S.C.,

Plaintiff-Appellant,

v.

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. This appeal concerns a dispute between two law firms over the fees due each as the result of a settlement in the personal injury case of Stephen Wolenec. Action Law, Inc. appeals a judgment awarding Habush, Habush, Davis and Rottier (Habush) \$46,000 plus \$100 in costs from a sum placed in trust pending resolution of the dispute. For the reasons we explain below, we reverse and remand to the trial court for further proceedings.

BACKGROUND

Wolenec was injured in a motor vehicle accident on July 26, 1991. On September 16, 1991, he entered into a one-third contingency fee agreement with Habush. On July 3, 1993, Wolenec discharged Habush and retained Action Law to represent him. Action Law also undertook to represent Wolenec's wife, Barbara, on a loss of consortium claim. Barbara Wolenec had not been represented by Habush.

In the spring of 1995, Action Law negotiated a \$290,000 settlement with the alleged tortfeasor's insurer, Heritage Mutual Insurance Company, for both Wolenec's personal injury claim and his wife's loss of consortium claim. This settlement was approved in another case, Case No. 94 CV 0607. The Wolenecs initiated this action against Habush, alleging that Habush's refusal to resolve the dispute over the amount of fees due Habush was interfering with the distribution of the settlement proceeds. The Wolenecs, Action Law, Habush and Heritage Mutual stipulated in this action that Action Law was to be substituted for the Wolenecs; that \$56,760 was to be held in escrow as disputed attorney fees, with the court to determine the proper allocation of that sum between Habush and Action; that the rest of the settlement proceeds were to be distributed pursuant to orders entered in Case No. 94 CV 0607; and that under no event were the Wolenecs obligated to pay any more than a total fee of one-third of the settlement amount.

Action Law moved for declaratory relief, a motion which the trial court treated as one for summary judgment. Action Law contended that Wolenec discharged Habush for cause and therefore Habush was not entitled to any attorney fees. Action Law also contended that, even if Habush were not discharged for cause, Habush was not entitled to fees pursuant to its contract with Wolenec because that would be a "windfall" for Habush in view of the amount of work it did. Habush's position was that it did not breach its contract with Wolenec; rather, Wolenec breached the contract by discharging Habush. Habush argued to the trial court that it was therefore entitled to one-third of the amount of the settlement properly allocated to Wolenec, less \$28,000 in fees due Action Law for the 280 hours it expended at its hourly rate of \$100.

In its May 9, 1996 decision and order on Action Law's motion, the trial court determined that \$240,000 was the amount of the settlement properly allocated to Wolenec's claim. That determination is not challenged on appeal. The court concluded that Habush was entitled to recover under its contract with Wolenec unless Wolenec discharged Habush for cause. The court examined the three grounds that Action Law advanced as deficiencies in Habush's performance constituting cause for discharge: failure to act with reasonable diligence and promptness; failure to keep Wolenec reasonably informed; and failure to provide competent representation. With respect to the first two grounds, the court determined that conflicts between Wolenec's affidavit and the affidavit of James Jansen, the Habush attorney who worked on Wolenec's case, created issues of material facts which made summary judgment inappropriate. With respect to the last ground, the court concluded that summary judgment was inappropriate because Action Law had simply asserted that Habush had handled Wolenec's case differently than Action Law did and had not shown that Habush had violated its duty to provide competent representation when measured against an objective standard of attorney competency.

The trial court went on to rule that, if it were determined at trial that Wolenec did not have cause to discharge Habush, Habush would be entitled to \$46,000: one-third of \$240,000, less attorney fees and costs to Action Law in the amount of \$34,000.

After the trial court's decision denying summary judgment, Action Law and Habush entered into a stipulation whereby both parties waived the right to present live testimony for trial and agreed to permit the court to decide whether Wolenec discharged Habush for cause based on the affidavits and exhibits already submitted to the court for the summary judgment motion. The parties also stipulated that each would submit one brief, simultaneously. The court approved this stipulation.

In its brief, Action Law asked the trial court to reconsider its determinations that there were disputed issues of fact, arguing that the facts were undisputed and entitled Action Law to judgment as a matter of law that Habush's performance was deficient. In its brief, Habush argued that because the court had determined that the affidavits created disputed issues of fact involving credibility, in the absence of live testimony there was no basis for

finding either party's testimony more credible than the other's. According to Habush, since Action Law, as the plaintiff, had the burden of proof, Habush was entitled to judgment.

The trial court's written order, entered on July 16, 1996, recited the parties' stipulation, refused to grant Action Law's request for reconsideration of the court's decision denying summary judgment, and concluded:

The court finds that Action has failed to meet its burden that Habush was discharged for "good cause" in each of its three allegations. Habush is, therefore, entitled to judgment against Action in the amount of \$46,000.

The judgment subsequently entered, in addition to adjudging the amounts due Habush and Action Law from the sum held in trust, contained this introductory phrase: "The above captioned matter having been submitted to the court for trial without a jury, the Court having rendered its Findings, Conclusion and Order in its Order dated July 16, 1996 for the reasons set forth in the "Review of Record" and "Analysis" sections of this Court's Order dated May 9, 1996...."

DISCUSSION

The parties' dispute begins with the standard of review. Action Law asserts that the court failed to make findings of fact as required by § 805.17(2), STATS.,¹ and therefore we must review the record to determine

¹ Section 805.17, STATS., provides in part:

- (2) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court.... Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

whether the trial court's conclusion that Habush was not discharged for cause is supported by a preponderance of the evidence. Action Law contends it is not. Habush responds that the court did make a "finding"--that Action Law had not met its burden of proof--and that the court supported this "finding" with a reference to the May 6, 1996 order which explained the court's decision in more detail. According to Habush, we should affirm the court's "finding" that Action Law failed to meet its burden of proof because it is not clearly erroneous. See § 805.17(2), STATS., (trial court's findings of fact are not set aside unless clearly erroneous).

Before deciding the proper standard of review, we must determine what the trial court did. The difficulty is that it is not clear from the court's order of July 16, 1996, and the final judgment what the trial court did do. This lack of clarity is reflected in the parties' conflicting characterizations of the trial court's ruling.

The reference in the final judgment to the May 9, 1996 decision denying summary judgment contributes to the confusion rather than clarifying it. When a court decides a motion for summary judgment, it reviews the moving party's submissions to determine whether they make a prima facie case; if so, the court then reviews the opposing party's submissions to determine whether they create a genuine dispute of material fact. See *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). That is what this trial court properly did when it denied Action Law's motion for summary judgment. In deciding a motion for summary judgment, a reviewing court does not weigh the evidence, resolve conflicts in the evidence, choose among competing reasonable inferences from the evidence, or make credibility determinations. Those are the functions of the trial court when it acts as the trier of fact, see *Milbauer v. Transport Employees' Mut. Benefit Soc.*, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973), after a motion for summary judgment is denied.

(..continued)

the opportunity of the trial court to judge the credibility of the witnesses.... If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein.... The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

The trial court here did not engage in evaluating the evidence as a fact-finder when it decided the motion for summary judgment, and that was correct. Therefore, reference in the final judgment to the trial court's decision denying summary judgment is not the type of "finding and conclusions" contemplated by § 805.17(2), STATS., when a trial court sits as the trier of fact: that reference does not and cannot explain the reason for the trial court's decision after disputed issues of fact are tried to the court.

It appears to us that the trial court accepted Habush's argument that because Action Law did not present additional materials or testimony after summary judgment was denied based on disputed issues of material fact, Action Law did not meet its burden of proof. This is not a finding of fact, but rather a conclusion of law based on the undisputed procedural facts. See *Kress Packing Co., Inc. v. Kottwitz*, 61 Wis.2d 175, 179, 212 N.W.2d 97, 99 (1973). We review conclusions of law de novo. *First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

We agree with Habush that, because the court determined that the conflicting affidavits of Wolenec and Jansen presented credibility issues regarding whether Wolenec discharged Habush for cause,² the court could not, based on those same materials and without live testimony or, perhaps, further submissions, resolve those credibility issues. Since Action Law had the burden of proving that Wolenec discharged Habush for cause, in the absence of any additional testimony or submissions, it could not meet its burden. If this is what the court ruled, we agree with its analysis.

² It is clear from the trial court's May 9, 1996 decision that, as to the first two alleged grounds of deficient performance, the court considered the affidavits of Wolenec and Jansen to present an issue of credibility that could not be resolved on summary judgment. As for the third alleged ground--failure to provide competent representation--it appears that the court did not determine that a credibility issue made summary judgment inappropriate. Rather, it appears that the court either concluded that Action Law had not made a prima facie case on this ground or, if it had, Jansen's affidavit presented reasons for the manner in which he handled Wolenec's case that were sufficient to create a factual dispute as to whether the representation he provided was competent. Since any one of the three grounds alleged would constitute cause for discharge, the court's reasoning on the third ground does not affect our analysis.

However, this ruling is not the result of the trial court acting as a fact-finder but is rather a ruling on the legal effect of the stipulation. As such, it is inconsistent with the court's approval of the stipulation. By approving that stipulation, the court agreed to the procedure by which the parties "submit[ted] the issue [whether Wolenec discharged Habush for cause] to the Trial Court for the determination as the finder of fact based solely on [the existing record]." Since the trial court had already concluded that the case could not be decided on the existing record because of credibility issues--with which we agree--the proper course was for the court to advise the parties of that and give Action Law the option of either presenting additional evidence or dismissal.

It is true, as Action Law contends, that when a trial court fails to make findings of fact in a trial to the court, we may review the record, affirming the trial court's determination if it is supported by a preponderance of the evidence and reversing if it is not so supported. *Mohr v. Harris*, 118 Wis.2d 407, 411, 348 N.W.2d 599, 601 (Ct. App. 1984). We also have the third option of remanding to the trial court. *Id.* We conclude the third option is the most appropriate here. Since it is likely that the trial court did not engage in fact-finding for a very good reason--that it could not resolve the crucial credibility issues on the existing record--we decline to review the court's decision as if it did engage in fact-finding.

On remand, the court may conduct such further proceedings as it considers appropriate to enable it to decide if Wolenec discharged Habush for cause and to make the necessary findings of fact and conclusions of law supporting its decision. Although the court approved the stipulation of the parties, it may conduct the proceedings it considers appropriate in spite of that approval.³

We now address two other issues Action Law raises on appeal because they will likely remain issues on remand. First, Action Law argues that even if Wolenec did not have cause to discharge Habush, Habush is not entitled to the contract amount less a fair allowance for remaining work because

³ The parties' stipulation required the trial court to act in a particular way--resolve factual and credibility issues without further evidence. The trial court has discretion to approve or disapprove such a stipulation. The parties cannot by stipulation require the court to proceed in this manner. The trial court is not bound by its prior approval if it decides it cannot proceed as the parties stipulated.

Habush performed only de minimis services on Wolenec's behalf. Specifically, Action Law contends that the court erred in applying *Tonn v. Reuter*, 6 Wis.2d 498, 95 N.W.2d 261 (1959), to this case. We conclude that the trial court was correct in concluding that, based on *Tonn*, Habush was entitled to the contract amount less a fair allowance for remaining work if Wolenec did not have cause to discharge Habush.

In *Tonn* the court held that the proper measure of damages for an attorney who is retained by a client under a contingent fee agreement and then is discharged without cause is the amount of the contingent fee based on the amount of the settlement or judgment, less a fair allowance for the services and expenses that would necessarily have been expended by the discharged attorney in performing the balance of the contract. *Id.* at 505, 95 N.W.2d at 265. In reaching this conclusion, the court first discussed the various approaches adopted in other jurisdictions, including the approach whereby the attorney may recover only in quantum meruit for the services performed prior to the discharge. *Id.*

It is true that the client's case in *Tonn* had progressed farther than had Wolenec's case at the time of discharge. However, nothing in the court's decision in *Tonn* indicates that the amount of work performed before discharge has a bearing on the manner for determining damages. In expressly rejecting a quantum meruit approach, the court was rejecting an approach whereby the recovery of the attorney initially retained would be limited to the value of services actually performed. In adopting the measure of damages that it did adopt, the *Tonn* court was deciding that the attorney initially retained and then discharged without cause, rather than the attorney subsequently retained, should benefit from any "windfall" resulting from the contingent fee contract.

Of course, the amount of work performed before discharge may well have a bearing on the amount of damages, because the more work that remains to be performed, the greater will be the deduction for services and expenses necessary to perform the balance of the contract. But under *Tonn*, the amount of work performed before discharge does not affect the initial attorney's right to recover based on the contract. Action Law has not pointed us to any cases decided after *Tonn* that suggests a modification of the measure of damages adopted in *Tonn*.

Action Law's second argument is related to the first and fails for much the same reason. Action Law contends that, even if Wolenec did not discharge Habush for cause, the amount of attorney fees allocated to Habush is unreasonable and excessive given the amount of work performed. We agree with Action Law that, in determining the reasonableness of fees, a court need not honor a contingent fee agreement if it is excessive. See *Hutterli v. State Conservation Comm.*, 34 Wis.2d 252, 258, 148 N.W.2d 849, 852 (1967). However, Habush advises us in its brief that the court in Case No. 94 CV 0607 determined that a one-third contingency fee was fair and reasonable and Wolenec has paid that fee in full. Since Action Law does not dispute this assertion, we accept it as true. See *Schlieper v. DNR*, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). The issue before the trial court in this action was the allocation between the two law firms of the amount already determined to be a reasonable fee for Wolenec to pay. On this issue, as we have stated above, *Tonn* is dispositive. The trial court did not err in concluding that Habush was entitled to \$46,000 in fees if Wolenec did not have cause for discharging Habush.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.